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Hanson Aggregates Pacific Southwest, Inc., d/b/a Hanson SJH Construction *and* Laborers' International Union of North America, Local No. 89, LIUNA, AFL–CIO. Case 21–CA–34950

August 31, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On May 21, 2003, Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief. The General Counsel filed a brief in reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, and to adopt his recommended Order.

The judge found that the Respondent did not violate Section 8(a)(5) of the Act when**,** at the employees' request, it transferred six employees from the laborers unit, which was represented by the Laborers' International Union of North America, Local No. 89, LIUNA, AFL–CIO (the Union), to the heavy equipment operators unit,[2] withdrew recognition from the Union as their representative, and unilaterally discontinued trust fund contributions on their behalf.

For the reasons stated below, we agree with the judge that the work of the six transferred employees did not remain essentially the same as the work that they had performed in the laborers unit**.** Contrary to our dissenting colleague's claim**,** the Respondent was not, therefore, required to recognize the Union as their collective-bargaining representative or to make trust fund contributions on their behalf. Accordingly, we adopt the judge's recommendation and dismiss the complaint.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The unit of operators had previously been represented by Operating Engineers, but was no longer represented at the time of the events at issue.

I. FACTUAL BACKGROUND

The Respondent produces, delivers, and applies asphalt for construction industry customers. It employs three distinct groups of paving crew employees: a laborers unit (the laborers), a drivers unit (the drivers), and a heavy equipment operators unit (the operators). The Union represents employees in the laborers unit.[3] Building Material, Construction, Industrial Professional & Technical Teamsters Union, Local 36 represents the employees in the drivers unit, and the employees in the operators unit are unrepresented.

Employees in all three units work at a common paving site. The drivers deliver the asphalt to the paving site. The laborers perform various tasks on the jobsite that involve physical labor, such as grading, shoveling, digging, raking, and traffic control. The operators operate the paving equipment, such as the rollers, asphalt spreaders, bulldozers, moving equipment, and screeds. The judge found that although the three units were distinct, from time to time laborer and driver employees performed overflow operator work.

Foremen on the paving site, responsible for crews consisting of laborers, drivers, and operators, may be from the laborers unit or the operators unit. The laborers unit foreman position is covered under the Union's contract**.** The operators unit foreman's position is governed by terms and conditions of employment set by the Respondent, including a higher wage rate than the rate under the Laborers' agreement.

With the Union's knowledge and consent, laborers are sometimes assigned to perform overflow operator work. This includes, for instance, operating the screed roller or the asphalt spreader. The parties' collective-bargaining agreement**,** however, does not address the assignment of operators unit work to laborers**,** and laborers have no entitlement to operator work. When laborers are assigned the overflow operators work, the Respondent pays them the higher operators unit wage rate while maintaining the Union's contract terms for nonwage compensation.

As set forth above, the laborers perform operators work on an "overflow" or "as assigned" basis, when there are no operator unit employees available to complete the operating tasks. Thus, the laborers are never guaranteed operator work. As the judge found, "the historical work of the laborers unit as operators has not been to perform a fixed quantum of operators work or even a fixed proportion of all operator work. Rather, the labor-

[3] The Union's 1997–2001 collective-bargaining agreement with the Respondent requires, inter alia, that the Respondent make trust fund contributions on behalf of the represented employees.

ers do and have historically done the operators work that—for whatever reason—there are no operators at hand to do." If operator work is unavailable, the laborers continue to work on laborers tasks.

Conversely, employees in the operators unit engage in full-time operator work. They are never assigned laborers work on an overflow, or any other basis.

In August 2001, the employees in the drivers unit went on strike, and many of the laborers honored this strike. Four of the laborers (Gerardo Rosas, George Robles, Ruben Robles, and Jose Villegas) and two of the laborer foremen (Carlos Gomez and Guillermo Garcia) honored the strike for a short period of time, but subsequently asked the Respondent if they could return to work in the operators unit. The Respondent granted their request**.** The following six were transferred to the operators unit**,** Rosas, G. Robles, R. Robles, and Villegas as operators and Gomez and Garcia as operators unit foremen. The six employees resigned from the Union; at that time, the Respondent stopped applying the Union's contract to the six employees and discontinued making contractually required trust fund payments on their behalf. Instead, the six received the higher operators wage rate, plus operator fringe benefits.

Thereafter, a union agent observed some of the transferees performing some laborers tasks at paving sites in Ramona and Lakeside, California. Subsequently, the General Counsel issued a complaint alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by: 1) reclassifying the six laborers unit employees as operator unit employees; 2) withdrawing recognition from the Union as to these employees; and 3) unilaterally discontinuing trust fund contributions on their behalf. There is no allegation that the Respondent violated the Act in any other respect.[4]

II. ANALYSIS

The General Counsel contends that, by granting the request of the six laborers to transfer to operator positions, the Respondent violated Section 8(a)(5), on the theory that their work remained essentially the same after their placement in the operators unit, the only change being their exclusion from the bargaining unit and from the coverage of the collective-bargaining agreement. In support of this contention, the General Counsel relies on *McDonnell Douglas Corp.*, 312 NLRB 373, 377 (1993) (employer violated Section 8(a)(5) by assigning bargaining unit employees, without the union's consent, to another division and removing them from the unit when their job duties and functions and terms and conditions of employment remained essentially the same), rev'd on other grounds 59 F.3d 230 (D.C. Cir. 1995); see also *United Technologies Corp.*, 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989) (employer violated Section 8(a)(5) when, without the union's consent, it eliminated certain bargaining unit positions and created new nonunit positions involving essentially the same work with improved methodology and efficiency caused by the introduction of computer technology).

We find that the General Counsel's contention is based on a flawed analysis of the actions that took place here. More particularly, the General Counsel is mistaken in asserting that the work of the six employees remained essentially the same after their transfer to the operators unit. With respect to Rosas, G. Robles, R. Robles, and Villegas**,** prior to their transfer they were contractually entitled only to perform laborers unit work. Although they were also assigned operator work, as the judge found, they performed it *only* on an overflow basis, i.e., when there were not enough operators to complete the operators work. As laborers, these employees were not guaranteed "a fixed quantum of operator work or even a fixed proportion of all operator work." As noted above, they had no entitlement to operator work, and they had no guarantee as to how much—if any—operator work would be assigned them. The record is clear that the essential work of the laborers unit was laborers work and that operators work in this unit was "non-full time, nonguaranteed, as available, as assigned, on again off again."

The fact that, immediately prior to their transfer, they had performed a significant amount of operator work does not warrant a contrary result. This was the result of pure happenstance, i.e., a temporary increase in overflow operator work. Thus, had the transfer of the four laborers to the operators unit occurred a few weeks earlier or later, the laborers would have been doing almost exclusively laborers work prior to the transfer and exclusively operators work after the transfer. There would have been no basis for asserting that the four laborers unit employees continued to do essentially the same work after their transfer to the operators unit.

The sporadic assignment of nonunit work ended when the employees transferred to the operators unit. After the transfer, only operators work was assigned; nonunit laborers work was not. While the transferees testified that they occasionally helped laborers on the paving crew site when they had completed their assigned operators work, this was not an indication—as the General Counsel and our dissenting colleague contend—that they continued to do essentially the same work that they had performed in

[4] Thus, there is no allegation that the Respondent's transfer of the six was discriminatorily motivated or that the Respondent unlawfully failed to provide the Union with notice of the transfer or an opportunity to bargain over it.

the laborers unit. Rather, it was voluntarily performed on their part, when they had completed their required operator duties.

Our colleague quotes the judge as finding that the laborers have "long and regularly" performed operator work. In fact, the judge said that the laborers had "long and regularly" performed *overflow work* on an "as needed" basis. See ALJD, p. 6, LL. 4–5.

As to Garcia and Gomez, they transferred from laborer foremen to the separate existing position of operator foremen. Although, as operator foremen they continued to oversee paving crews comprised of operators, laborers and drivers, they did so under entirely different terms and conditions of employment. Thus, the operators foremen receive considerably higher pay than their laborers counterparts, while the laborers foremen receive the benefits of the Union's collective-bargaining agreement that the operators foremen do not. Thus, contrary to our dissenting colleague's claim, there is a significant difference between the terms and conditions of employment of the laborers and operators foremen; and in this regard, the laborers foremen did not perform essentially the same work after they transferred to the operators unit as operators foremen.[5]

The underlying policy concerns of the *McDonnell Douglas* line of cases are simply not present here. This is not a situation where work is removed from the unit, but continues to be performed in virtually identical form outside of the unit. With regard to the four laborers, it cannot be said that their transfer to the operators unit removed work from the laborers unit. As the judge emphasized, the laborers unit received operator work only on a nonguaranteed, overflow basis. Thus, as the judge found, "when additional operator unit staff are employed, the operator work being done by the laborer employees does not in this sense shift from the laborers unit to the operators unit." The transfer of four laborers to the operators unit did not affect the laborers unit receipt of overflow operators work. Similarly, the transfer of the two laborers foremen did not remove work from the unit. The laborers foremen positions continued to exist and would be filled by other employees.

Unlike the *McDonnell Douglas* line of cases, the transfers at issue here had no impact on the unit. The laborers unit continued to receive operators work on an overflow basis. Further, the laborers who transferred into the operator unit performed quintessential operator work, i.e., they were assigned only operators work and did laborers work only if they voluntarily elected to do so when they had completed their operator duties. Similarly, the laborers foremen positions remained in the laborers unit when the two laborers foremen transferred to the operators unit. In sum, no structural change occurred when the six employees were transferred. The work of the units and the job positions in the units remained the same after the transfers as before them. Thus, this was merely a transfer between two existing units, and nothing more.

Accordingly, we agree with the judge that the Respondent has not unlawfully reclassified the six employees as nonunit heavy equipment operators. Therefore, we find that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union with respect to these six employees and discontinued making contractually required trust fund payments on their behalf.

ORDER

The recommended Order of the administrative law judge is adopted, and the complaint is dismissed.

Dated, Washington, D.C. August 31, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting.

The case presents the issue whether the Respondent unlawfully removed a group of six employees from the bargaining unit without the Union's consent. Under settled Board and court precedent, the Respondent's conduct violated Section 8(a)(5) and (1) unless it has shown that the group "is sufficiently dissimilar from the remainder of the unit so as to warrant its removal." *Bay Shipbuilding Corp.*, 263 NLRB 1133, 1140 (1982), enfd. 721 F.2d 187 (7th Cir. 1983). As discussed below, the Respondent failed to make the necessary evidentiary showing. Nevertheless, the majority dismisses the complaint. Accordingly, I must dissent.

I. FACTUAL BACKGROUND

The Respondent operates an asphalt paving business. Its paving crews are made up of employees from three units: a drivers unit, an operators unit, and a laborers unit.

Drivers deliver the asphalt to the jobsite. A Teamsters local represents the drivers.

[5] Compare *McDonnell Douglas Corp.*, supra at 377 (employees that were transferred out of the bargaining unit and into nonunit positions maintained "'basically' the same" wages, hours, and working conditions of the bargaining unit employees).

Operators operate the heavy paving equipment. They are not represented by a labor organization.

The Union represents the laborers. Laborers primarily perform tasks involving physical labor, such as grading, shoveling, digging, raking, and traffic control.

However, laborers are also assigned operator work when there are not enough operators available to perform operator duties. The judge specifically found that laborers "have long and regularly" performed operator work on an "as assigned" or "as needed" basis.[1] When performing operator work, laborers are compensated at the higher operator rate of pay, and they continue to receive all the benefits of the Union's collective-bargaining agreement, including trust fund contributions.

Paving crews have a single foreman who may be from the laborers unit or the operators unit. The duties of a laborer foreman are essentially identical to the duties of an operator foreman. However, there is a difference in compensation. Operator foremen received considerably higher pay than their laborer counterparts. The laborer foreman position is covered under the Union's contract, while the operator foreman position is not covered by any collective-bargaining agreement.

In August 2001, the employees in the drivers unit went on strike. Two of the laborer foremen (Guillermo Garcia and Carlos Gomez) and four of the laborers (George Robles, Ruben Robles, Gerardo Rosas, and Jose Villegas) honored the strike for a short period of time, but subsequently asked the Respondent if they could return to work in the operators unit. The Respondent granted their request, removed the six employees from the laborers unit, and reclassified them as operators. The Respondent refused to recognize the Union as the collective-bargaining representative of the six employees and unilaterally discontinued trust fund contributions on their behalf.

As discussed more fully below, even after their removal from the laborers unit, former laborer foremen Garcia and Gomez still performed essentially the same duties. With respect to the four former laborers, they spent a greater proportion of their workday operating the heavy paving equipment, but they continued to regularly perform laborer work.

II. ANALYSIS

As stated above, *Bay Shipbuilding* and its progeny stand for the proposition that "an employer violates the Act, when, without the agreement of the union, it removes a substantial group of employees from a bargaining unit without showing that the group is sufficiently dissimilar from the remainder of the unit to warrant removal." *United Technologies Corp*., 292 NLRB 248 (1989), enfd. 884 F.2d 1569 (2d Cir. 1989). Accord, *Illinois-American Water Co.*, 296 NLRB 715, 719–720 (1989), enfd. 933 F.2d 1368 (7th Cir. 1991).[2]

Here, it is undisputed that the Union did not consent to the Respondent's removal of the group of employees from the bargaining unit. Therefore, the Respondent bears the burden of establishing that the removed group is "sufficiently dissimilar" from the remainder of the unit to warrant removal. As discussed below, the Respondent did not carry its burden.

A. The Two Laborer Foremen (Guillermo Garcia and Carlos Gomez)

The violation of the Act is plainly established with respect to the removal of laborer foremen Garcia and Gomez and their work from the laborers bargaining unit. The record clearly shows that Garcia and Gomez continue to perform the same duties as operator foremen that they had previously performed as laborer foremen when they were covered under the Union's collective-bargaining agreement. In fact, Garcia and Gomez testified that their job duties have not changed since their transfer to the operators unit. Thus, there can be no doubt that the Respondent has utterly failed to satisfy its burden under *Bay Shipbuilding* of showing that, after it removed the two laborer foremen from the laborers unit, their job duties were "dissimilar from" their job duties while in the laborers unit. 263 NLRB at 1140. Therefore, the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as their col-

[1] The majority implies that I have misstated the judge's findings. The reader of this decision may judge for himself whether there is any merit to that claim. In order to assist the reader, the pertinent part of the judge's findings are quoted below:

> Given these findings respecting the work, I find that the operator work described is work within the operators unit and also work within the laborers unit. There is no question the work, paving heavy equipment operation, is full time operators unit work. The laborers in the "as assigned" or "as needed" overflow role as described below, have long and regularly also done this work and been specifically compensated for this work at the operators unit operator's wage rate.

[2] It is irrelevant that the movement of the six employees was initiated not by the Respondent, but by the employees themselves, who requested a transfer from one unit to another. *Bay Shipbuilding* sets forth the legal standard for determining whether a respondent violated the Act by removing positions from a bargaining unit. As discussed below, the Respondent's granting of the employees' requests resulted in the removal of six bargaining unit positions from the laborers unit. Therefore, the *Bay Shipbuilding* test applies here. Of course, this would be a very different case if the record showed that, after granting the employees' requests, the Respondent hired replacements for the six employees in question. In that event, there would be no loss of unit jobs or work.

lective-bargaining representative, and by unilaterally discontinuing trust fund contributions on their behalf.

B. The Four Laborers (George Robles, Ruben Robles, Gerardo Rosas, and Jose Villegas)

Although the removal of the four laborers presents a somewhat closer question, a violation of the Act is also established with respect to them because the Respondent likewise failed to show a substantial change in their job duties.

1. Job duties before removal from laborers unit

Before their removal, the four laborers primarily performed duties involving physical labor, such as shoveling and digging. However, as the judge found, they also "long and regularly" performed operator work. In fact, the assignment of operator work to laborers was so significant a portion of their job responsibilities that the Respondent compensated them for it at the higher, operator wage rate.

2. Job duties after removal from laborers unit

After their removal, the four former laborers performed primarily operator work. However, as the judge found, they also performed laborer tasks on a regular basis. Although the employees testified that they only performed such work to assist other crewmembers and were not formally assigned laborer tasks, the fact remains that, notwithstanding their removal from the laborers unit, they continued to regularly perform laborer work.

3. Summary

The record shows that, while in the laborers unit, the four employees performed primarily laborer duties, but also regularly performed some operator work. After their removal from the laborers unit, the employees performed primarily operator duties, but also regularly performed some laborer work. In sum, the employees' new job was the mirror image of their former job. The Respondent's burden, however, was to show more than a change in the relative percentages of time spent engaged in laborer and operator tasks. Under *Bay Shipbuilding*, the Respondent was obligated to show "changes in job structure . . . so significant that that the existing bargaining unit, including the affected employees, is no longer appropriate." *Bay Shipbuilding*, supra, 721 F.2d at 190. That is plainly not the case here inasmuch as the four employees are still regularly performing the laborer and operator tasks assigned to laborers-represented employees. Therefore, the Respondent violated Section 8(a)(5) by refusing to recognize the Union as the collective-bargaining representative of the four former laborers, and by unilaterally discontinuing trust fund contributions on their behalf.

Dated, Washington, D.C. August 31, 2004

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

Robert Mackay, Esq., for the General Counsel.
Alan R. Berkowitz, Esq., and *Daniel A. Feldstein, Esq., with him on brief, Bingham McCutchen*, of San Francisco, California, for the Respondent.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard the above captioned case in trial in San Diego, California, on February 3 and 4, 2003, pursuant to a complaint and notice of hearing issued by the Regional Director of Region 21 of the National Labor Relations Board on August 14, 2002. The complaint is based on a charge and an amended charge filed by the Laborers' International Union of North America, Local No. 89, LIUNA, AFL–CIO (the Charging Party or the Union) against Hanson Aggregates Pacific Southwest, Inc., d/b/a Hanson SJH Construction (the Respondent) on January 30, 2002, and April 26, 2002, and docketed as Case 21–CA–34950.

The complaint, as amended at the hearing, alleges, and the answer denies, inter alia, that the Respondent in August 2001, failed and refused to continue to recognize the Charging Party as the exclusive representative of six of its employees as members of a unit of its laborer employees and unilaterally discontinued trust fund contributions for the six employees in the laborers unit, and in so doing, unilaterally changed the existing terms and conditions of employment of the six employees without prior notice to the Charging Party and without affording the Union an opportunity to bargain with the Respondent with respect to this conduct. The complaint alleges this conduct as a violation of Section 8(a)(5) and (1) of the Act. The Respondent denies that it has violated the Act.

Findings of Fact

Upon the entire record herein, including helpful briefs from the Respondent and the General Counsel, I make the following findings of fact.[1]

I. JURISDICTION

The Respondent is, and has been at all relevant times, a Delaware State corporation with offices in San Ramon, California and a mixing and asphalt application facility located on Harris Plant Road, San Diego, California, where and from which it has been engaged in the production, delivery, and application of asphalt for construction industry customers.

[1] As a result of the pleadings and the joint and other stipulations of counsel at the trial, there were few disputes of fact regarding collateral matters. Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, or unchallenged credible evidence.

During the 12-month period ending July 31, 2002, which period is representative of the Respondent's operations, the Respondent, in conducting its San Diego business operations, purchased and received at its San Diego facility goods and materials valued in excess of $50,000 directly from points outside the State of California.

Based on the above, there is no dispute and I find the Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The record establishes, there is no dispute, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

In 1999, the Respondent acquired the business of the Sim J. Harris Company, and has continued to operate the business to the present time. The continuing operation at the Harris Plant Road, San Diego facility includes the mixing, delivery, and onsite application of asphalt for the construction industry.

The Respondent's operations involve asphalt paving. The Respondents paving crew employees have historically worked in three units: a laborers unit, a drivers unit, and a heavy equipment operators unit. These three groups of employees cooperate during the paving process. The drivers deliver the asphalt to the paving site. Heavy equipment operators operate the Respondent's paving equipment such as rollers, asphalt spreaders, bulldozers, Caterpillar brand material moving equipment and screeds. The laborers at the paving jobsites perform various tasks including physical labor: grading, shoveling, digging, raking, and traffic control. Additional work has also traditionally been done as described more particularly below. Paving crews have a single foreman who may be from the laborer's unit or the operators unit. In the case of laborer foremen, the position is within the unit and is covered by the contract.

The drivers have long been represented by Building Material, Construction, Industrial Professional & Technical Teamsters Union, Local 36 (the Teamsters). The heavy equipment operators had been represented by the International Union of Operating Engineers Local 12. However since at least several years preceding the Respondent's acquisition of the operations, these employees have not been represented by a labor organization.

The Charging Party has long represented a unit of the Respondent's laborer employees. The Respondent after its acquisition of the operations adopted the 1997–June 15, 2001 contract (the Contract) with the Union that had been in force with its predecessor. On August 6, 2001, the Regional Director of Region 21 of the Board issued a certification of representative in Case 21–RC–20363 certifying the Union as the exclusive representative of the Respondent's employees in the following unit:

> All laborers employed in San Diego County by the [Respondent] at and out of its facility located at 9229 Harris Plant Road, San Diego, California; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act.

The Contract at Section 4 defines the work covered as:

> . . . all jobsite work performed by the [Respondent] for the construction, in whole or in part, or the improvement or modification thereof, of any project or other work and operations which are incidental thereto, and the assembly, operation, maintenance and repair of all equipment, vehicles and other facilities used in connection with the performance of the aforementioned jobsite work and services.

The Contract further provides for trust fund contributions by the Respondent on behalf of employees performing covered work.

The issues in controversy concern six individuals who commenced work for the Respondent as laborers within the labor unit but who over the course of time came to do substantial heavy equipment work and in some cases became paving crew foremen.

B. Events

1. The employees involved

While the three units involved in construction paving operations are distinct, within the industry, within the predecessor company, and within the Respondent's operations, particularly since the heavy equipment operators have not been represented by a labor organization, both driver and labor employees from time to time perform heavy equipment operator work. There is no dispute that within the Respondent's operations, with the knowledge and consent of the Charging Party, laborer unit employees undertook heavy equipment operator work. While the collective-bargaining agreement does not address this question specifically, the Respondent's laborers who did operator work were compensated for that work by the Respondent at the higher operators hourly rate paid to operators unit employees while receiving the laborer's contract terms for nonwage compensation.

Six of the Respondent's employees are involved in the matter in controversy: Messrs. Carlos Gomez, Guillermo Garcia, Gerardo Rosas, George Robles, Ruben Robles, and Jose Villegas. The six men were employed by the Respondent initially in the laborers unit and compensated under the terms of the collective-bargaining agreement. Messrs. Carlos Gomez and Guillermo Garcia became laborer foremen within the laborer classification overseeing paving and grading crews. The other four individuals also initially worked as laborers but were soon thereafter utilized for a substantial proportion of their time as equipment operators receiving operators unit wages for the time they worked as operators.

In July 2001, a Board election was held resulting in the certification of the Charging Party described supra. The Respondent's voter eligibility list included these 6 individuals among a total of 37 listed eligible voters.

2. The events of August 2001

In August 2001, the drivers unit struck the Respondent and many of the employees in the laborers unit honored the strike. The six individuals named above contacted the Respondent and sought to return to work as operators. The Respondent utilizing its normal administrative procedures transferred them to the operators unit—the two individuals working as laborer foremen were transferred to operator foreman positions—and the six thereafter worked as operator employees in the operators unit receiving operator unit wages and fringe benefits. At the time of the transfer the Respondent ceased applying the laborers contract and ceased making any payments on their behalf to the trusts under that contract. The six also resigned from the Union.

The Union learned of the resignations of the six upon receiving them in August but did not learn of the Respondent's cessation of Laborer's contract contributions until September. The Union raised the matter with the Respondent during an October 2001 bargaining session. The Respondent's agent told them he would check on the matter and reported back to the Union at the next bargaining session that the contract contributions for the six had been halted because the individuals were no longer laborers but were now equipment operators in the operators bargaining unit.

C. Analysis and Conclusions

1. Argument of the parties

The General Counsel argues that the Respondent simply reclassified the six laborer unit employees without changing their duties and that they continued at all times to perform laborers unit work. Thus argues the General Counsel the Respondent unlawfully altered the scope of the bargaining unit without the agreement of the Union violating Section 8(a)(1) and (5) of the Act. The General Counsel's argument continues, since the six individuals remained in the laborers unit, the discontinuation of coverage of them under the laborers contact is a violation of Section 8(a)(1) and (5) of the Act. As part of the remedy in this latter case, the General Counsel urges that the Respondent be held liable for liquidated damages under the terms of the contract for failure to make appropriate contributions.

The Respondent argues that the six individuals did essentially nothing but operators unit work before their transfers and did nothing but operators unit work after their transfers. Thus the Respondent argues that laborers unit work was not effected by the employees' transfer. The Respondent notes that the General Counsel's complaint does not contend that the Respondent's actions in connection with the employees' transfer requests or their resignations from the Union violated Section 8(a)(1) of the Act. Where no independent wrong doing is at issue, the Respondent urges, the transfers of the six individuals should be found to be simple transfers from one bargaining unit to another respecting which the Respondent has no duty to bargain with the Union. The allegation that the transfers were in violation of the Act should therefore be dismissed. Further, given the propriety of the transfers, the allegations respecting discontinuance of the application of the laborers contact to the individuals is also without merit and should be dismissed.

2. Analysis

a. The unit status of the work and the relationship of the operators and laborer's work

The record makes quite clear that paving equipment operation, which is the prime work of the operators unit employees, has also long been done by employees from the laborers unit. More particularly the nonsupervisory four of the six employees involved herein clearly did almost exclusively paving equipment operation prior to their reclassification by the Respondent from the laborers unit to the operators unit. And the two supervisory employees as laborer foremen each supervised a paving crew which—like all other paving crews—included both operators and laborer unit employees. The assignment of laborers unit employees to do operators work by the Respondent was not surreptitious. The Respondent monitored the work, kept records of the amount of time given laborers spent in doing operator work and compensated the laborers employees for their operator time with operators wages, but laborer's nonwage fringes. The Charging Party was aware of the Respondent's practice and had never protested or opposed its continuance.

Following the transfers of the six laborers unit employees, their work remained essentially the same. Thus, the work of the two supervisors did not change in the sense that there is no record evidence that supervision of the paving crews—either by an operator foreman or a laborer foreman—differed based on the classification of the foreman. To the extent the foremen from time to time assisted crew operators or laborers in doing crew unit work, it is not evident that either the operator foremen or the laborer foremen conducted themselves differently in running the asphalt paving crews.

The remaining four individuals from the laborers unit after their reclassification by the Respondent as operators continued to do essentially full-time paving equipment operator work. Several of them testified that as crew members they had occasion to assist other crew members from time to time and that this assistance included working at laborer tasks when work flow or priority required it. The Union's witnesses testified that they observed these individuals to be doing laborers work rather than operators work, but their observations were made during the drivers work stoppage at a time when the laborers unit employees were at least to a degree honoring the strike and not working. I do not discredit the Union's witnesses so much as find that the period in question was unusual. Further I credit the testimony of the transferees that they continued to do their previous duties which were virtually entirely operator work. Given the evidence that the paving crew members helped one another during the paving process as needed without distinction respecting craft, I do not find the fact that these individuals regularly do some "assisting" of crew members which includes laborers work to be of consequence.

Given these findings respecting the work, I find that the operator work described is work within the operators unit and also work within the laborers unit. There is no question the work, paving heavy equipment operation, is full-time operators unit work. The laborers in the "as assigned" or "as needed" overflow role as discussed below, have long and regularly also done

this work and been specifically compensated for this work at the operators unit operators wage rate.

Even if the work's content is the same, however, important distinctions between the work as done by the employees in the two units exist. The operator unit employee doing operator work is a full-time operator who has no nonoperator work alternatives. Laborer unit employees who do operator work do so only on an as needed basis and, if operators work is not available, are able to work at other laborers unit tasks. For labor unit employees, operator work is conceptually a temporary or as needed job assignment without permanent or guaranteed status as a laborer operator. The nature of the work is also different from the Respondent's perspective because of this flexible aspect of the laborers unit operators. An operator in the operators unit, as a full-time employee doing only operator work, must be utilized consistent with those employment limitations. If there is no operator work, the operator employee may not be quickly transferred to other duties. A labor employees doing operator work may be quickly reassigned or perhaps automatically returns to labor duties if the Respondent either has no operator work to be done or simply chooses to have others do that work.

Further the operators unit is clearly the main source of operators for the Respondent's paving crews. Operators unit employees are employed as full-time operators and as operators only. The operator work assigned to the laborers in the laborers unit has always on this record been a residual or over flow amount of work. Laborers do, on the ad hoc basis described, the operators work when for whatever reason the Respondent determines there is no operator unit employee available. No suggestion was made that operators do not replace laborers when and if they are available to work on the crew where laborers are operating the heavy equipment. Thus, the historical work of the laborers unit as operators has not been to do a fixed quantum of operators work or even a fixed proportion of all operator work. Rather the laborers do and have historically done the operators work that—for whatever reason—there are no operators at hand to do. This is a classic overflow situation.

Based on all the above, I find that job content of the operator work done by employees in both the operator unit and the laborers unit is identical and that each unit has an historical claim to that work. I further find however that the nature and circumstances of the operator work done by the laborers in the laborers unit, i.e., the overflow, non-full time, non-guaranteed, as available, as assigned, on again off again, nature of the work and the nature and circumstances of the full-time operator work done by operators in the operators unit, are importantly, even fundamentally, different because of the overflow basis for assigning laborers to the work, the nature of the work assignments described above and because the laborer unit operators are covered by a collective-bargaining agreement and the operators in the operators unit are not.[2]

[2] Board unit cases are tangentially relevant to the instant analysis. The laborers unit employees at issue herein are analogous to the Board's definition of "dual-function employees." Under *Berea Publishing Co*., 140 NLRB 16 (1963), the community of interest tests applied to part-time employees are also applied to dual-function employees. However the Board in *Otasco, Inc.*, 278 NLRB 376 (1986), held that contract bar principles precluded the inclusion of dual-function employees in a petitioned-for unit where they are already included in a unit covered by a contract. Thus, were a Board election conducted among eligible employees in the operators unit, the operator employees in the laborers unit if under contract would under *Otasco* not be properly part of the operators unit nor allowed to vote in such an election.

b. The nature and motivation of the Respondents transfer of the six employees

The complaint does not allege an improper transfer of employees from one bargaining unit to another. Rather the complaint alleges that certain laborers unit employees resigned from the Charging Party in August 2001, and that in that same month the Respondent withdrew recognition of the Union as the representative of those employees and unilaterally discontinued trust fund contributions for them under the laborers contract.[3] This conduct is alleged to constitute a unilateral change in conditions of unit employees, without notice to the Union or affording the Union a opportunity to bargaining respecting the change in violation of Section 8(a)(5) of the Act.

The sequence of events is not directly in controversy. During the period the laborers were honoring the Teamster's strike in August 2001, the six employees involved herein contacted the Respondent and initiated a process that resulted in their being transferred by the Respondent from the laborer's unit to the operators unit, in their resigning from the Union, and in the Respondent ceasing to treat them as laborer unit employees and thereafter dealing with them as members of the unrepresented operators bargaining unit.

The complaint alleges only a violation of Section 8(a)(5) and (1) of the Act and does not allege any independent violations of Section 8(a)(1) or Section 8(a)(3). Thus, the General Counsel did not allege in the complaint that the Respondent coerced or wrongly induced employee resignation from the Union or transfer from the laborers unit. The Respondent offered position statements from the General Counsel into evidence providing that such contentions would not be made at trial and argued that the government was therefore precluded from arguing such a theory of a violation.

Without addressing the Respondent's waiver defense, I find on this record there is insufficient evidence to support a finding that the Respondent wrongfully caused or encouraged the employees in the processes described above. Rather I find, crediting the employees statements and testimony, that they were aware of the operators unit positions and determined on their own to leave the laborers unit and the Charging Party's representation and become operator unit employees.

c. Was the Respondent obligated to either obtain the agreement of the Union or provide notice and an opportunity to bargain respecting the changes undertaken?

There is no dispute that the Respondent transferred the six employees from the laborers unit to the operators unit without

[3] There is no allegation that the Respondent has violated Section 8(a)(5) of the Act with respect to any aspect of its bargaining relationship with the Charging Party save respecting these six employees and their disputed transfers, as well as the withdrawn recognition and the cessation of contract payments respecting them.

the Union's permission and without notifying the Union or affording it an opportunity to bargain respecting the transfers. The complaint does not allege these actions as a violation of the Act. Rather the complaint alleges as violations that the concomitant withdrawal of recognition of the Charging Party as these employees representative and the discontinuance of contractual contributions respecting them without the Union's permission and without notifying the Union or affording it an opportunity to bargain respecting the matters. The complaint in actuality however puts the propriety of the transfer in issue for it is the transfer on which the Respondent relies to justify its withdrawal of recognition of the Charging Party as these employees representative and for its discontinuance of contractual contributions on their behalf.[4]

The General Counsel's theory of a violation is essentially that the Respondent in transferring the employees, withdrawing recognition and stopping contractual payments changed the scope of the unit. Counsel for the General Counsel on brief marshals an impressive presentation of cases supporting the proposition that tampering with the bargaining unit by changing its scope or transferring unit work to nonunit employees may not be done without the representing labor organization's consent. The government looks to the essential identity of the work done by the six transferees before and after their transfers to argue the transfers were not bona fide but simply sham transactions to cloak the diminution in the work done by represented unit employees.

The Respondent argues that no unit changes or modifications were involved in its actions. Rather the six employees were simply transferred from one bargaining unit to another. The scope of the work being done in each unit was unchanged: six individuals previously in and doing laborer's unit work were transferred into the operators unit and thereafter did operators work. The Respondent argues that the government's theory of the case: (1) would force employees to remain in place locked into their current jobs because they would be foreclosed from accepting transfers to better paying jobs and, (2) improperly limits employers' rights to hire into or transfer employees from one bargaining unit to another.

I agree with the Respondent that the transfers involved herein were in fact transfers from one discrete bargaining unit, the laborers unit, to another separate bargaining unit, the operators unit. I further agree that the transfers did not involve comingling the work of or in some fashion distorting or changing the bargaining units. To this extent I simply reject the governments theory of the case at the basic, conceptual level. The Respondent at no time altered the scope of the laborers bargaining unit.

[4] The Board has taken pains to establish guidelines respecting whether or not certain assignment and unit changes are mandatory or permissive subjects of bargaining. See, e.g., *Antelope Valley Press*, 311 NLRB 459 (1993). Those distinctions are not relevant here because the complaint alleges that the Respondent's actions concerned a mandatory subject of bargaining. Since the Respondents actions were taken without notice to the Union, if the Respondent's actions concerned a mandatory subject of bargaining, its failure to provide the Union with notice and an opportunity to bargain violated Sec. 8(a)(5) of the Act.

The General Counsel propounds an alternative theory of the case: even if the units are regarded as separate, the Respondent has violated Section 8(a)(5) of the Act by assigning unit work—here the laborers unit operators work—to the operators unit without obtaining the consent of the Union or providing notice to and an opportunity to bargain to the Union respecting the shift in unit work. The General Counsel correctly points out that under this approach to the case, prior to the transfer, the six individuals were doing laborers unit work and after the transfer that work—which was still being done by those six individuals—had been removed from the laborer's unit. Since the population of the laborers unit was apparently in the mid-thirties at relevant times, perhaps one sixth of the laborers unit work was transferred from the laborers unit to the operators without the Union's knowledge or consent.

The Respondent argues that the operators work in the laborers unit and the operators units, although identical in work content, are fundamentally different and the units are independent. Thus, the Respondent argues that it has no obligation in law to give the Union veto rights, bargaining rights, or notification of its staffing decisions respecting the operators unit. It not only does not have the obligation to do so, but it has in fact never done so and, further, the Union until the events in controversy has never asserted any right or interest in staffing levels in the operators unit.

The argument on this element of the case is somewhat ambiguous and unclear. In my view the cause of a certain lack of clarity of argument is the confusion arising from the fact that the two separate bargaining units do similar if not identical work but do so under importantly different circumstances, as discussed above. It is useful to reiterate the critical differences in the units and the consequences of those differences for the Respondent's obligations under Section 8(a)(5) of the Act.

The operators unit positions are full time. The laborers unit operators work is on an "over flow," "as needed," not guaranteed full time, fill in basis. This is a critical difference. While there is a practical relationship between the staffing levels of the operators positions in the operators unit and the amount of operators work available to the laborers unit, conceptually when additional operator employees are hired the work that had been done by laborers, but which now will be done by the operators in the operators unit is not transferred from one unit to the other. The laborers unit at all times does the "over flow" operator work for the Respondent, i.e., the work that the Respondent does not choose to have the operator unit staff do. When additional operator unit staff are employed, the operator work being done by laborer employees does not in this sense shift from the laborers unit to the operators unit. Rather the operators unit continues to do the full-time permanent operator work, with more individuals working, and the laborers unit continues to do all the overflow, as assigned operator work.

Given this unusual state of affairs and the historical evolution of the relationship between the two units in this respect, I agree with the Respondent that it has no obligation under Section 8(a)(5) of the Act to notify and provide an opportunity to bargain with the Union as representative of the laborer's unit over the staffing levels the Respondent maintains in the operator's unit or the amount of operator work it chooses to do with

operators in the operators unit. This is true even though staffing within the operator's unit has consequences for the amount of work that is available to the employees in the laborer's unit. It follows from that determination that the Respondent had no obligation under Section 8(a)(5) of the Act to notify and bargain with the Union respecting the transfer of the six individuals involved herein from the laborers unit to the operators unit.

Further, given the findings above that the transfers were not improper, the transferred employees from the time of their transfer were properly considered operator unit employees and not laborer unit employees. Therefore, because these individuals were no longer laborer unit employees, it was also not improper under Section 8(a)(5) of the Act for the Respondent to cease making contractual fringe payments to the Union on the transferred employees behalf and to withdraw recognition of the Union as these employees representatives.

Given all the above, and on the basis of the record as a whole, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act as alleged in the complaint and that the complaint should therefore be dismissed in its entirety.

CONCLUSIONS OF LAW

On the basis of the above findings of fact and the record as a whole and Section 10(c) of the Act, I make the following conclusions of law.

1. The Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party is, and has been at all relevant times, a labor organization within the meaning of Section 2(5) of the Act.

3. The Charging Party represents the Respondent's employees in the following unit, which is appropriate for bargaining within the meaning of Section 9 of the Act:

> All laborers employed in San Diego County by the [Respondent] at and out of its facility located at 9229 Harris Plant Road, San Diego, California; excluding all other employees, office clerical employees, professional employees, guards, and supervisors as defined in the Act

4. The Respondent did not violate the Act as alleged in the complaint and the complaint shall be dismissed in its entirety.

ORDER

Based upon the above findings of fact and conclusions of law, and on the basis of the entire record herein, I issue the following recommended Order.[5]

The complaint shall be and it hereby is dismissed in its entirety.

Dated, San Francisco, California May 21, 2003

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.